# Petition

81-1811

No.

Supreme Court, U.S.
FILED
DEC 7 1981
ALEXANDER E. STEVAS
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

Five Booklets, and Don Slater,
*Petitioner,*
vs.
United States of America,
*Respondent,*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

DON SLATER, *Petitioner,*
BY DON SLATER, *pro se,*
6758 Hollywood Boulevard
Hollywood, California 90028

## QUESTIONS PRESENTED

The questions presented by this petition are:

1. Is the forfeiture of the October, 1978, issues of *Revolt* magazine invalid because the government failed to bring the the case to judgment within the time prescribed in *United States v. 37 Photographs* (1971), 402 U.S. 363?

2. Was the judgment on the pleadings entered by the district court and affirmed by the Ninth Circuit Court of Appeals against the 4 copies of *Revolt* not addressed to the Homosexual Information Center the proper method of adjudicating their moral character?

3. Are the guidelines set forth by this Court in *Miller v. California* (1973), 413 U.S. 15, which require the triers of fact in obscenity proceedings "to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient'," and the statement in the decision that "People in different States vary in their tastes and attitudes [concerning the depiction of sexual conduct], and this

diversity is not to be strangled by the absolutism of imposed uniformity," in conflict with the provisions of 19 U.S.C., Section 1305(a) which require the triers of fact to conclusively define the moral "character" of matter seized -- thus its admissibility -- for the entire country?

4. Assuming, as have the courts below, that the *Miller* standards must in fact be applied to Sect. 1305(a), are not the moral norms of the people of California thereby imposed on the people of the rest of the nation in as much as the judgments condemning the magazines will be enforceable in other communities, thus depriving people with different "tastes and attitudes" in "different states" of equal protection and due process of the law, and the First Amendment right to decide the obscenity of the same material for themselves?

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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Five Booklets, and Don Slater,
*Petitioner,*
vs.
United States of America,
*Respondent,*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

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*To the Honorable the Chief Justice and the Associated Justices of the Supreme Court of the United States:*

Your petitioner, Don Slater, librarian of the Homosexual Information Center, respectfully prays that a writ of certiorari be issued out of and under the Seal of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit, rendered on June 25, 1981, which affirmed the judgments of the United States District Court for the Central District of California, rendered against the defendants and claimant.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix B-21) was filed June 25, 1981; it is reported at 654 F.2d 732; petition for rehearing was filed July 15, 1981, and denied September 4, 1981.

## JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C., Section 1254(1). Jurisdiction of the District Court was conferred by 28 U.S.C., Section 1333(2); and Article III, Section II of the Constitution of the United States.

## STATUTE INVOLVED

Pertinent provisions of 19 U.S.C., Section 1305(a), are set forth in Appendix A.

## STATEMENT OF THE FACTS

Claimant and petitioner, Don Slater, is librarian of the Homosexual Information Center Library, to which the October, 1978 issue of *Revolt* was addressed. The Library has a standing order to receive every issue of the magazine to the end of publication. On October 2, 1978, agents of the

United States Customs seized five copies of the October, 1978, issue of *Revolt*. On October 13, 1978, the United States Attorney filed a complaint consolidating the five magazines for trial and forfeiture pursuant to 19 U.S.C., Sect. 1305(a) as being obscene. Each of the magazines had been posted to a different address. Notice of the action, accompanied by a form letter designating the time for claim and answer (Appendix B-4), was sent to the parties to whom the magazines were addressed on or about November 21, 1978. Don Slater filed a claim for the five copies of the magazine on December 8, 1978, and answer on January 2, 1979.

On January 23, 1979, the government sought a partial judgment on the pleadings as to four of the five defendant magazines, and on February 23, 1979, a judgment condemning the magazines on this basis was entered by the Honorable Robert Firth, United States District Judge, in Los Angeles, California.

A second hearing, on the one copy of *Revolt* addressed to the Homosexual Information Center Library, was held on February 27, 1979, by the Honorable Robert

Firth. On May 4, 1979, Don Slater filed notice of appeal from the judgments, and said appeal was subsequently perfected, briefs filed, and the cause argued and submitted to the Court of Appeals for the Ninth Circuit.

On June 25, 1981, the United States Court of Appeals for the Ninth Circuit affirmed the judgments of the District Court in a Memorandum (Appendix B-21).

On September 4, 1981, the United States Court of Appeals for the Ninth Circuit denied appellant's petition for rehearing (Appendix B-27).

## SPECIFICATION OF ERRORS

The Court of Appeals erred as follows:

1. On the first question, by declining to consider the issue of delay, although the issue was before the Court at all times.

2. On the second question, by never actually ruling on appellant's contention -- and disregarding his authorities in support thereof -- that the presence in the district court of the defendant magazines was itself sufficient to prevent a

default judgment against them.

3. On the third and fourth questions, by assuming that because this Court has said that the "community standards" test of obscenity in *Miller v. California*, 413 U.S. 15, is "applicable to federal legislation" (*United States v. 12,200-Ft. Reels of Film* (1973), 413 U.S. 123, at p. 130), it must be applied to the statute, 19 U.S.C., Sect. 1305(a), without considering whether its finding serves the purpose of the statute or complies with the clearly expressed criticism in *Miller* of forcing people in one part of the nation to accept the community standards of those in another part of the nation.

## REASONS FOR GRANTING THE WRIT

### I.

### The Decision of the Court Below is in Conflict With an Applicable Decision of This Court.

In *United States v. Thirty Seven (37) Photographs* (1971), 402 U.S. 363, this Court established specific time requirements, to conform to constitutional safeguards, for processing forfeiture of

property seized pursuant to 19 U.S.C., Sect. 1305(a). The time limit was that there should be "no longer than 60 days from the filing of the action to final decision in the district court." Delay beyond this limit serves to invalidate the forfeiture -- except in those cases where the claimant by his own maneuvering extends the time. The kinds of conditions for which a claimant is responsible are spelled out, and decisions of other circuit courts have determined what constitutes a delay under these conditions. *United States v. (37) Photographs, supra; United States v. 2,200 Paper Back Books* (1977, 565 F.2d 566; *United States v. One 1973 Ford LTD* (1976), 409 F.Supp. 741; *Ivers v. United States* (1975), 413 F.Supp. 394. The time requirement is not waived simply because a claimant fails to raise the issue, or on the basis of some other issue unrelated to actual delay.

In the present case over four months elapsed from the filing of the complaint to the first judgment -- although petitioner adhered in good faith and with diligence to the schedule set and present-

ed to him by the government. It was not his obligation to analyze the schedule in terms of the 60 day time period in the *(37) Photographs* case. However, the issue of delay was before the courts during all stages of the proceedings (Appendix B). The delay -- brought on by the government's miscalculation and apparent indifference at first -- is a defect in its case that applies to all five defendants. And the instant decision of the Ninth Circuit Court of Appeals represents a grave restriction of petitioner's constitutional right to a prompt judicial settlement of the issues in dispute.

II.

The Decision of the Court Below is Inconsistent With a Recent Decision of Another Court of Appeals.

In the opinion of the Court of Appeals in *United States v. Various Articles of Obscene Merchandise* (1979), 600 F.2d 394, a default judgment is not the proper way to determine the fate of material seized under 19 U.S.C., Sect. 1305(a). Citing the language of the statute and the pronouncements of this Court in such cases

as *Freedman v. Maryland* (1965), 380 U.S. 51, and *Blount v. Rizzi* (1971), 400 U.S. 410, among others, the Appellate Court for the Second Circuit concluded: "In our judgment, Congress intended this final restraint to be imposed only upon a judicial determination that the seized articles are 'obscene'." *United States v. Various Articles of Obscene Merchandise, supra,* at p. 399. According to this ruling the presence or absence of claimants in forfeiture proceedings is a matter of no relevance in determining the form the trial must take. The seized property viz. the defendants -- controls. The appearance of the *named defendants* in court automatically insures against a default judgment.

The decision of the Ninth Circuit Court of Appeals which allowed the judgment on the pleadings against the copies of *Revolt* not addressed to the Homosexual Information Center to stand is not in keeping with the principle developed by the Court of Appeals for the Second Circuit. Rather, the Court below begged the question by assuming without argument that because in its view Slater did not qualify as a

claimant the Court was not obliged to consider the default question at all. However, if the reasoning in *United States v. Various Articles of Obscene Merchandise,* 600 F.2d 394, is to be relied on, the presence of a claimant without standing will no more cancel the principle involved than the total absence of claimants. If anything, a claimant without standing is simply redundant. Although by butting in, as it were, petitioner has served as a catalyst for the raising of this issue, the responsibility for doing so and for enforcing the correct procedure ought to have rest with the Ninth Circuit Court of Appeals.

Even if petitioner's wish to save all the copies of *Revolt* consolidated for trial may not have been sufficient motive to give him standing, his instinct to preserve the magazines from destruction by default appears to be justifiable and more in line with current judicial thinking about the intent of Sect. 1305(a) than the view still taken by the Court of Appeals for the Ninth Circuit.

## III.

## The Application of the *Miller* Standards of Obscenity to 19 U.S.C., Section 1305(a) Is Incompatible With the Congressional Purpose Behind the Statute, and With the Commands of the *Miller* Opinion Itself.

The Court of Appeals for the Ninth Circuit affirmed that the community standards test of obscenity set forth in *Miller v. California* (1973), 413 U.S. 15, was applicable to Sect. 1305(a) of 19 U.S.C on the basis of the opinions of this Court in *United States v. 12,200-Ft. Reels of Film* (1973), 413 U.S. 123, and *Hamling v. United States* (1974), 418 U.S. 87. These two cases extended to federal offenses the "community standards" concept used previous to that time in state criminal prosecutions of obscenity.

Petitioner respectfully submits that an understanding of the *Miller* opinion is critical to the consideration of this reason relied on for granting the writ. The opinion of this Court in *Miller* was an attempt to grapple with the thorny problem of obscenity. See *Roth v. United States* (1957), 354 U.S. 476; *Jacobellis v.*

*Ohio* (1964), 378 U.S. 184; *Memoirs v. Massachusetts* (1966), 383 U.S. 413; *Ginzburg v. United States* (1966), 383 U.S. 463; *Redrup v. New York* (1967), 386 U.S. 767; *Ginsberg v. New York* (1968), 390 U.S. 629 -- some of the cases illustrative of the attempts to establish, enlarge upon or tighten, various tests and a lasting definition.

However, this Court in *Miller v. California*, 413 U.S. 15, concluded that there was no such thing as a recognizable national standard of obscenity. And that because explanations of what "appeals to prurient" interests depends less on objective data than on regional attitudes about its acceptability or unacceptability no attempt should be made to arrive at a uniform definition or to fix one on the nation. Specifically this Court said: "These are essentially questions of fact [that which is obscene and offensive], and our Nation is simply too big and too diverse for this Court to reasonably expect that . . . standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." 413 U.S. 15,

at p. 30. The Court added: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. . . . People of different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Miller v. California, supra,* at p. 33. The decision was left to local communities, and courts and juries using "basic guidelines" were permitted to figure out for themselves "whether 'the average persons, applying contemporary community standards' would find" a "work, taken as a whole, appeals to the prurient interest." *Miller v. California,* at p. 24. Triers of fact in different states might arrive at different conclusions about the same material. "The mere fact juries may reach different conclusions about the same material does not mean that constitutional rights are abridged." *Miller v. California, supra,* at p. 26, fn. 9. Petitioner respectfully submits, however, that whereas community standards of determining obscenity may

work in regard to state criminal prosecutions, they don't work with federal statutes -- which involve, as they do, the tastes and values of people all over the nation. The minute this flexible approach to the problem of obscenity is teamed with Sect. 1305(a) the purposes of both are defeated.

19 U.S.C., Sect. 1305(a) prohibits the "importation" of "Immoral articles" into the "United States." The statute acts on the contraband *before* it loses its character as an import -- before it reaches *any* community. By its very terms the statute requires triers of fact to make a decision that is conclusive for the whole country -- indeed, for the whole world. See Rufus Waples, *A Treatise on Proceedings in Rem,* Ch. XII, Sect. III; See also *Gelston v. Hoyt,* 3 Wheat. 246; *Williams v. Armroyd,* 7 Cranch 423; *United States v. 2180 Cases of Champaign* (1926), 9 F.2d 710; *United States v. One Obscene Book Entitled "Married Love"* (1931), 48 F.2d 821; *United States v. One Carton Positive Motion Picture Film* (1965), 248 F.Supp. 373. As such, Sect. 1305(a) depends for its enforcement on a national, uniform definition of every article entry of

which is prohibited. The United States is the "community" in this case.

This Court has said: "To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *Miller v. California,* 413 U.S. 15, at p. 30. By the same token, petitioner respectfully submits, to require the federal government to structure obscenity proceedings around evidence of a *local* community standard is an equally futile exercise. There are national standards controlling the other items prohibited by Sect. 1305(a). Granted, it is much easier to define the substance of drugs and medicines, and to identify lottery tickets, than it is to define "Immoral articles." But historically there has been a search by the courts for a precise and inclusive definition of obscenity as well. If obscenity can't be defined nationally, it can't be prohibited nationally.

In *Horst Nemetz v. Immigration and Naturalization Service* (1981), 647 F.2d 432, a case that does not deal with the moral character of articles but with the

moral character of a person seeking citizenship in the country, the Court of Appeals for the Fourth Circuit held that the moral character of the immigrant -- who admitted having homosexual relations -- had to be judged by a national standard capable of being understood and consistently applied throughout the land. And the Fourth Circuit Court found such a standard. Petitioner respectfully submits that the problem of the importation of "Immoral articles" needs the same harmony in practice.

In essence, the application of community standards criteria of obscenity to Sect. 1305(a) does that indirectly which this Court in the *Miller* case strictly forbids to be done directly. It imposes the arousal values of people in one section of the country on those in other sections. Not a national value that everyone necessarily has a stake in whether they agree or not, but one allowing for variations in tastes and attitudes from place to place. Although the people of California might prefer not to have the people east of the Mississippi and south of the Mason-Dixon Line make court-approved decisions

for them that affect their personal reading habits, it could happen. In the present instance, the judgment of condemnation by the district court in Los Angeles prevents the entry and dissemination of the October, 1978, issue of *Revolt* into other communities where it might be found tolerable -- if the people in the other communities were given the chance to decide the question for themselves. This is certainly a far greater evil than the evil the *Miller* decision tried to eliminate.

Although state laws regulating verbal and nonverbal sexual conduct are not conclusive evidence of community standards (*Miller v. California, supra; Smith v. United States* (1976), 431 U.S. 291), state laws are relevant for this purpose, and a court or jury may weigh such evidence in making an obscenity determination. 22 states including California have now removed criminal penalties from private consensual sex acts -- whether between persons of the same or opposite sex, or between married or unmarried partners. Iowa has no law regulating the distribution of obscene material to adults. Thus,

if partial reliance on state codes influences juries to allow federal channels of communication to be used for entry of obscene materials into permissive states, and into the rest of the country as well, there may be a conflict with the powers delegated to Congress in Art. I, Sect. 8, Cls. 3 of the Constitution of the United States. For the purpose of affirming a criminal conviction in the case of *Smith v. United States,* 431 U.S. 291, this Court held: a "State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State." 413 U.S. 291, at p. 307. Ironically, the application of the *Miller* formula to Sect. 1305(a) comes close to doing just that.

Even if the various community standards are uniformly enforced under Sect. 1305(a), the imprecise nature of controlling obscene material on the basis of local tastes may mean that the potential for infringement of First Amendment rights

will be greater than is necessary in many instances for the preservation of so-called important and substantial governmental interests.

It is respectfully submitted by Petitioner that the community standards criteria of obscenity enunciated in *Miller v. California* applied to Sect. 1305(a) produces a legal/legislative deadlock that should be weighed with more care than that devoted by the district court and the Court of Appeals for the Ninth Circuit. And that the case of *United States of America v. Five Booklets* presents a proper, fitting, and compelling occasion for the exercise of the learned and distinguished supervisory powers of this Court.

DON SLATER, Petitioner,
By DON SLATER,
pro se.

# Appendix

## APPENDIX A

"All persons are prohibited from importing into the United States . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation . . . or other article which is obscene or immoral. . . .

"Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided. . . .

"Upon the adjudication that such book or matter . . . is of the character the entry of which is by this section prohibited, it shall be ordered destroyed. Upon the adjudication that such book or matter thus seized is not of the character entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section." 19 U.S.C., Section 1305(a).

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

---

United States of America,
Plaintiff,
vs.
FIVE (5) BOOKLETS,
Defendants.

---

No. CV 78-3927-RF(Tx) Judgment as to Four (4) of Defendants, entered Feb. 23, 1979.

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The motion of plaintiff United States for partial judgment on the pleadings came on for a hearing before the Honorable Robert Firth, United States District Judge, on the 12th of February, 1979. The Court, having considered the pleadings and other documents filed herein and arguments of counsel, finds that notice

of this action has been given in the manner required by law, and that no appearance has been made by any proper claimant with respect to the four (4) defendants identified on Exhibit A to the Complaint as Seizure Nos. 79270400001-4,5,6 and 7. Therefore, the Court deems that the potential proper claimants admit the allegations of the Complaint to be true with respect to said four (4) defendants, and therefore,

ORDERS, ADJUDGES AND DECREES that the four (4) defendants identified on Exhibit A to the Complaint as Seizure Nos. 79270400001-4, 5, 6 and 7, be and the same are, hereby condemned and forfeited to the United States of America.

IT IS FURTHER ORDERED that the United States Marshall shall destroy the said four (4) defendants and make his return to the Court.

DATED: February 21, 1979.

R. Firth
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

---

United States of America,

Plaintiff,

vs.

Five (5) Booklets,

Defendants.

---

Judgment, Case No. CV 78-3927-RF(Tx)
Entered March 14, 1979

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This action having come on for trial before the Honorable Robert Firth, United States District Judge, on February 27, 1979, as Seizure Number 79270400-001-8, and the issues having been duly tried and in accordance with the Findings of Fact and Conclusions of Law entered herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said defendant be, and same is, hereby condemned and forfeited to the United States of America.

IT IS FURTHER ORDERED that the United States Marshall shall destroy said defendant and make his return to the Court.

DATED: March 12, 1979.

R. Firth
UNITED STATES DISTRICT JUDGE

HOWARD GEST
Assistant United States Attorney
for Plaintiff

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

United States of America,
Plaintiff-Appellee,
vs.
Five Booklets,
Defendants,
Don Slater,
Claimant-Appellant.

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Nos. 79-3330 and 79-3331; D.C. No. CV 78-3927 M E M O R A N D U M, June 25, 1981

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Appeal from the United States District Court for the Central District of California, Robert Firth, District Judge, Presiding. Argued and submitted January 9, 1981

Before: GOODWIN and ANDERSON. Circuit Judges, and Gilliam,* District Judge.

On October 2, 1978, five copies of a Swedish magazine entitled Revolt were seized from the United States mail facility at the Los Angeles International Airport by agents of the United States Customs Service. Four of the five

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*The Honorable Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

magazines were copies of the same issue of Revolt. Each was addressed to a different individual or entity. The seizures were based upon an initial determination that the magazines were obscene thus subject to forfeiture pursuant to the provisions of section 305 of the Tariff Act, 19 U.S.C. Sect. 1305.

A complaint for forfeiture was filed by the government and notice of the pending action and instructions regarding the procedure for contesting the forfeiture were mailed to the respective addressees, including the Homosexual Information Center (Center) of which claimant-appellant Don Slater is the librarian. Only Slater, acting on behalf of the Center, responded by filing a claim and answer indicating that he intended to contest the forfeiture of all five magazines. Contending that Slater lacked standing to contest the forfeiture of the four magazines not addressed to the Center, the government moved for a partial judgment on the pleadings against those four magazines. The district court agreed

and entered a judgment condemning the four magazines to destruction.

Following the bench trial on the forfeiture of the fifth magazine, the district court entered a judgment declaring it obscene and ordering its destruction. Slater has appealed both judgments, and we now affirm.

Slater advances four contentions on appeal. First, he argues that the forfeitures were invalid by reason of the government's delay in prosecuting the action to a completion. This argument was presented by Slater in opposition to the government's motion for a judgment against the four magazines not addressed to the Center. However, the district court properly concluded that Slater could not challenge the forfeiture of the four magazines and, consequently did not consider the argument. Only those persons who claim an interest in the article or merchandise can contest its forfeiture. United States v. One 1945 Douglas C-54 (DC-4) Aircraft, etc., 604 F.2d 27, 28-29 (8th Cir. 1979); United States v. Fifteen Thousand Five Hundred Dollars,

558 F.2d 1359, 1360 (9th Cir. 1977). It is unnecessary for us to discuss the type or extent of interest that is sufficient, for Slater has alleged none. Rather, he merely asserts that it would have been "unchivalrous" of him not to attempt to save the other four magazines. We think Slater's efforts were well-intended, but we also think we stand on firm ground in concluding that chivalry just simply does not create standing.[1/] For some unexplained reason, Slater then failed to raise the issue in connection with the forfeiture of the only magazine in which he claimed an interest. The district court, therefore, had no occasion to consider the argument. In this circuit, we decline to consider issues not pressed or passed upon by the district court below unless reversal on that issue is necessary to avoid a miscarriage of justice or to preserve the integrity or reputation of the judicial process. Fitzgerald v. Century Park, Inc., 642 F.2d 356, 359 (9th Cir. 1981); United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S.

935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980); Frommhagen v. Klein, 456 F.2d 1391, 1395 (9th Cir. 1972). This is not such a case.

Second, Slater contends that the partial judgment against four of the five magazines was premature and should have been delayed pending a disposition of his claim. He does not contend, however, that their destiny would have differed had the judgment been delayed, or that his defense was prejudiced in any way. To the contrary, we find that he was given every opportunity to present evidence and to argue his legal theories. A different question would be presented if the judgments were conflicting, but they are not. Because the judgments are entirely consistent, any conceivable error in the timing of the judgments would be necessarily harmless.

Slater's third contention is that 19 U.S.C. Sect. 1305 is unconstitutional under the First and Fourteenth Amendments to the United States Constitution because the content of what it condemns must be tested by community

standards, rather than by national standards. The substance of the argument is that a federal prohibition must rest upon a uniform standard. The Supreme Court has specifically rejected the notion of a uniform national standard and has held that the standards enunciated in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), are applicable to federal obscenity statutes. Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973). The Court has explained that the factfinder is permitted "to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." Hamling, supra, 418 U.S. at 105.

Finally, Slater contends that, judged by contemporary community standards, Revolt magazine is not obscene because the sexual conduct it depicts is not unlawful in California. Even though

California's criminal code may be relevant, it does not conclusively define contemporary community standards as they relate to a federal statute that prohibits the use of the channels of commerce for the purpose of sending obscene material into this country. Smith v. United States, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). With regard to a federal criminal statute relating to obscenity, this court has observed that:

> "We deal with a federal law which neither incorporates nor depends upon the laws of the states. . . The fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the trial court, and in this case the trial court did resolve it."

United States v. Danley, 523 F.2d 369, 370 (9th Cir. 1975), Cert. denied, 424 U.S. 929, 96 S.Ct. 1143, 47 L.Ed.2d 338 (1976). The reasoning of Danley applies with equal force to proceedings under 19 U.S.C. Sect. 1305.

Each of Slater's contentions having been rejected, the judgments entered by the district court are now

AFFIRMED.

FOOTNOTES

1/ Slater has also argued that the judgment on the pleadings in this forfeiture case is substantially similar to the default judgments disallowed by the court in United States v. Various Articles of Obscene Merchandise, 600 F.2d 394, 398-400 (2d Cir. 1979). Consideration of this argument is unnecessary in light of our holding on the standing issue."

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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United States of America,
Plaintiff-Appellee,

vs.

Five Booklets,
Defendants,

Don Slater,
Claimant-Appellant.

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Nos. 79-3330 and 79-3331

O R D E R, Filed Sept. 4, 1981

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Before: GOODWIN and ANDERSON, Circuit Judges, and GILLIAM,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petittion for rehearing is DENIED.

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*The Honorable Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

# Opposition

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No. 81-1811

# In the Supreme Court of the United States

OCTOBER TERM, 1981

DON SLATER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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No. 81-1811

DON SLATER, PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner Slater contends that five copies of *Revolt* magazine should not have been forfeited as obscene.

On October 2, 1978, the United States Customs Service seized five copies of *Revolt* magazine, which were imported from Sweden. Each magazine was addressed to a different addressee. Pursuant to 19 U.S.C. 1305, the government filed a complaint against the magazines contending that they were obscene and therefore subject to forfeiture. Although notice was sent to each addressee, only petitioner Slater responded. Slater is the librarian for the Homosexual Information Center, one of the intended recipients of the magazines (Pet. App. B 5-6).

Following a trial in the United States District Court for the Central District of California, the Center's copy of *Revolt* was found obscene. Summary judgment on the

pleadings was entered against the other four magazines, which were not claimed by their intended recipients. The district court ordered the magazines destroyed (Pet. App. B 1-4), and the court of appeals affirmed (Pet. App. B 5-12).

The petition for a writ of certiorari is jurisdictionally out of time. A proceeding under 29 U.S.C. 1305 is civil in nature. A petition for a writ of certiorari to review a judgment entered in a forfeiture proceeding therefore must be filed within 90 days after entry of the judgment. 28 U.S.C. 2101(c). In this case, the judgment of the court of appeals was entered on June 25, 1981 (see Pet. App. B 5-12), and a petition for rehearing was denied on September 4, 1981 (Pet. App. B 13). The petition for a writ of certiorari was not filed until December 7, 1981, 94 days after the last order of the court of appeals in this case.

Rule 28.2 of the Rules of this Court provides that, although ordinarily a document must be received by the Clerk of the Court within the time specified for filing in order to be timely filed, a document will be deemed timely filed if it has been desposited in a United States post office or mailbox within the time allowed for filing *and* if there is filed with the Clerk a notarized statement by a member of the Bar of this Court setting forth the details of the mailing and stating that to his knowledge the mailing took place on a particular date within the permitted time. It is possible that petitioner, who filed his petition pro se, might have deposited the petition in the mail on December 3, 1981 (a Thursday)—the 90th day after the court of appeals entered its order denying the petition for rehearing—but the requisite notarized statement by a member of the Bar of this Court has not been filed.[1] The petition thus was not filed

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[1]The only evidence of mailing that petitioner has submitted is an unnotarized certification by William Morrisson, who is not a member of the bar of this Court, that the petition was mailed on September 4, 1981—the day on which the court of appeals denied the petition for rehearing.

within the 90 days required by 28 U.S.C. 2101(c), which time limitation is jurisdictional. See *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

MAY 1982

DOJ-1982-05